DOCKET FILE COPY ORIGINAL

RECEIVED

OCT - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests	)	WT Docket No. 97-192
For Relief From State and Local	)	FCC 97-303
Regulations Pursuant to	)	
Section 332(c)(7)(B)(v) of	)	
Communications Act of 1934	)	

97-192

Comments of Sprint Spectrum L.P. d/b/a Sprint PCS

I. Comments on "Definitional Issues"

A. Summary of Comments.

The FCC should adopt a more limited definition of "final action" than proposed in Paragraph 4 of the FCC's Notice of Proposed Rulemaking ("NPRM"). While defining "final action" as "final administrative action at the state or local government level" is consistent with the doctrine of exhaustion of administrative remedies, it ignores the very real problem faced by wireless telecommunications carriers needing to locate service facilities: the administrative process abuse prevalent in many communities that are fundamentally opposed to locating wireless telecommunication facilities within their borders.

Likewise, the proposal to adopt a rule providing that the FCC will determine whether a state or local government has "failed to act" on a case-by-case basis will not further the express mandate of the Telecommunications Act of 1996 ("TCA") that local

authorities make a decision on the placement, construction and modification of personal wireless service facilities within a "reasonable period of time." 47 U.S.C. §332(c)(7)(B)(ii). The very process of seeking review by the FCC of whether a government entity has "failed to act" on a case-by-case basis will only exacerbate the delay inherent in the failure to act itself.

Instead, the terms should be defined in a manner that establishes a period of time after which the state or local government's failure to conclude its process will be deemed an approval of the application. By adopting such a rule, the FCC will promote competition in the wireless telecommunications industry and establish a period of time after which an applicant adversely affected may commence an action in court or petition the FCC for relief. Without an FCC rule imposing finality upon what can be endless procedural obstacles, communities seeking to avoid the TCA will continue to impede the very competition the TCA is intended to foster by engaging in administrative process abuse. The actions of such communities are directly contrary to the letter and spirit of the TCA, which

> is designed to foster competition in the communications industry as the best means of promoting rapid deployment of advanced information technologies by the private sector, rather than the government.
>
> . . .
>
> The series of moratoria issued by the [local government] represent an anti-competitive impediment to expansion of communication services in Jefferson County. Providers entering the market several years ago were not subjected to the same barriers. Indeed, earlier entrants have benefited most from the moratoria, in that they have been sheltered from the competitive forces of a free market, while late entrants offering superior technology have been burdened in their attempts to fill gaps in their broadcast pattern and, thereby, to compete.

Sprint Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457, 1467 (D. Ala. 1997). Whether through moratoria or procedural barriers to consideration of the merits of a zoning application, such actions by local governments are contrary to the pro-competitive purposes of the TCA.

This Rulemaking is an opportunity to address these significant process barriers which are becoming more and more prevalent in communities intent upon avoiding the TCA.

B. Regulatory Abuses by Communities Intent on Avoiding the TCA.

The FCC seeks comment on the average length of time it takes to issue various types of siting permits, such as building permits, special or conditional use permits, and zoning variances and whether additional time is needed when such permits are subject to a formal hearing. It is virtually impossible to respond with relevant statistical data because of the tremendous variations in the provisions of state zoning enabling acts and zoning ordinances throughout the United States, as well as the informal processes through which they are often implemented. Many zoning acts merely require that local zoning authorities review the applications within a "reasonable period of time." Yet other statutes prescribe certain time limitations triggered by close of the hearing after which a decision must be made. For example, New York requires that a village board render a decision within 62 days of a final hearing, and in Vermont, failure to render a decision within 45 days of the public hearing results in an approval of the application. However, because these statutes do not impose time limitations on the hearing process, there is substantial opportunity for administrative delay.

In communities that oppose wireless telecommunication facilities, it is not unusual for an applicant to experience one or more of the following: refusal of the zoning authority to accept the application for filing, imposing in effect an informal moratorium; serial requests for additional information before the application is deemed complete and ready for hearing; failure to schedule the application for hearing; tabling of the application for one or more meetings; failure to close the hearing in order to avoid triggering any time periods during which a final decision must be made on the application; after the application is pending, the imposition of a formal moratorium prohibiting continued processing; adoption of a new ordinance to be applied retroactively to pending applications; and diversion of the application to the state's environmental review process, a process which often absorbs 6 critical months before the application can be returned to the zoning process.

Addressing a town attorney's explication of the distinction between "grant" and "issuance" of a special permit and the impact of the town's moratorium, one federal district court judge who was personally experienced in zoning matters commented on the sort of procedural gamesmanship all too familiar to wireless telecommunications carriers:

> I want to talk in a very practical way about what's going on. There is the aroma of obstruction under the May moratorium. And, so, to tell me about "issue" and "grant" is to suggest to me that someone has in their mind lawyer's games to play. I want to talk in a very practical sort of way about what this means. You said the hearing was going to open. **That raises in my mind that it will open and never end, that it will be July 2nd and August 2nd and September 2nd. And, frankly, having some familiarity with the administrative process in the context of Boards of [Zoning] Appeals, I'm not intrigued by it.**
>
> Congress has made a very specific statutory provision that's designed to avoid obstruction by local

> communities under whatever terminology they choose to use. And in fashioning an appropriate equitable remedy, I will be concerned to determine how – as a practical matter – we can serve the intent of Congress in drafting [the TCA].
>
> . . .
>
> So, my view is that the Board should in the ordinary course . . . consider on the merits the application with all that that process ordinarily means or should ordinarily mean. **That, in my mind, means probably no more than two hearing dates. The issues involved in this kind of thing are pretty clear by now, what it is that people object to, what it is that they don't.** The plaintiff should have some opportunity to respond to it by making modifications in their application. And **then the Board should be put to the responsibility of a written decision which evidences a resolution on the basis of substantial evidence**.

Remarks of Judge Douglas P. Woodlock in Sprint Spectrum L.P. v. Town of Dover, pending in the United States District Court for the District of Massachusetts (CA-97-11264-DPW) (emphasis added).

In short, unless a statute requires that consideration of an application be ***completed*** within a prescribed time after filing, the imposition of time periods triggered upon final hearing or some other event do nothing to prevent these administrative process abuses.

C. Suggested Modifications to the Proposed Rule

The TCA mandates that a

> State or local government or instrumentality thereof **shall act** on any request for authorization to place, construct, or modify personal wireless service facilities **within a reasonable period of time after the request is duly filed** with such government or instrumentality, taking into account the nature and scope of the request.

47 U.S.C. § 332 (c)(7)(B)(ii) (emphasis added). By this language, "Congress has tried to stop local authorities from keeping wireless providers tied up in the hearing process." Westel-Milwaukee Co., Inc. v. Walworth County, 205 Wis.2d 242, 556 N.W.2d 107, 109 (App. 1996). The FCC can only fulfill Congress' intention of increasing competition in the telecommunications industry and ensuring site applications are determined within a reasonable period of time by adopting a definition of "final action or failure to act" that imposes an outside date after which a pending application will be deemed approved.[1]

Thus, we recommend that the FCC adopt the following definition of "final action":

> As used in 47 U.S.C. § 332(c)(7)(B)(v), the term "final action" means final administrative action at the state or local government level so that an applicant can commence action under this section; provided, however, that notwithstanding state or local statutes, ordinances or regulations governing time for the decision-making process, an action shall be deemed a "final action" if upon applicant's submission of a complete application, the state or local government or instrumentality fails to render a decision within (a) 120-days, or (b) the time periods, if any, for decision-making processes prescribed in applicable zoning laws, whichever is earlier.

---

[1] New Jersey's statute entitled "Time for decision" is an appropriate model and provides as follows:

(a) The board of adjustment shall render a decision not later than 120 days after the date (1) an appeal is taken from the decision of an administrative officer or (2) the submission of a complete application for development to the board of adjustment pursuant to section 59b of this act.
(b) Failure of the board to render a decision within such 120-day period or within such further time as may be consented to by the applicant, shall constitute a decision favorable to the applicant.

N.J. Rev. Stat. § 40:55D-73 (1997).

This definition is entirely consistent with, indeed necessary to implement, the purposes of the TCA. The tension that exists between the preservation of local authority on substantive zoning issues on the one hand, and ensuring that requests for facilities are acted upon within a reasonable time to further the pro-competitive purposes of the TCA, on the other hand, is resolved through such a rule. A 120-day time period is adequate time for administrative review and public comment on an application, while at the same time discourages communities from engaging in delaying tactics.

D. Comments to Paragraphs 6 through 8 of the NPRM.

We agree with the FCC that it should be willing to grant relief from that portion of a final action or failure to act that is based in whole or in par, directly or indirectly, on concerns with the environmental effects of RF emissions. We also agree that the FCC's consideration of those aspects of a decision should not preclude an adversely affected party from seeking relief from the remainder of the state or local regulation from the appropriate federal or state court. It is appropriate for the FCC to review state and local decisions or actions when in fact they are based on concerns with RF emissions, and the stated reasons for the state or local government or instrumentality's decision are merely a subterfuge.

II. Comments on "Demonstration of RF Compliance"

The FCC should adopt the more limited showing proposed for categorically excluded facilities in Paragraph 10 of the FCC's NPRM. To adopt a more detailed showing as proposed in Paragraphs 11 and 15 effectively requires CMRS providers to perform, at the request of state and local authorities, routine RF exposure evaluations on

facilities that are categorically excluded under the FCC regulations from routine evaluation, if carriers are required to provide the type of information outlined in Paragraph 13 of the NPRM.[2] At most, the FCC should only permit state and local governments to request limited information showing that a facility is categorically excluded. However, if the FCC were to insist on an even more detailed showing beyond certifying or demonstrating that facilities are categorically excluded – despite the fact that such a requirement is inconsistent with FCC regulations, that it would be disproportionate to the extremely limited potential for routine exposure in excess of FCC guidelines, and that there are already FCC regulations and procedures in place to fully protect state and local environmental interests – in no event should the FCC restrict demonstrating compliance to one method of calculation or measurement, but should allow for a variety of methods.

For facilities categorically excluded from routine evaluation, the NPRM's proposed more limited showing allows "state and local authorities . . . to request that the personal wireless provider certify in writing that its proposed facility will comply with the Commissions RF emission guidelines." That more limited showing is essentially the same type of certification a personal wireless provider is required to make in its application to the FCC, and it is consistent with 47 CFR §1.1307(b)(1) which provides that a routine environmental evaluation is only required for specified facilities exceeding certain power levels, and that all others are categorically excluded:

---

[2] Sprint PCS's Comments only address categorically excluded facilities, since under both the FCC's proposed more limited and more detailed showings, facilities that are not categorically excluded appear to be treated the same.

> (1) The exposure limits in §1.1310 are generally applicable to all facilities, operations and transmitters regulated by the Commission. However, **a determination of compliance with the exposure limits in §1.1310** (routine environmental evaluation), and preparation of an EA if the limits are exceeded, **is necessary only for facilities, operations and transmitters that fall into the categories listed in Table 1, or those specified in paragraph (b)(2) of this section**. **All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA**, except as indicated in paragraphs (c) and (d) of this section. (Emphasis added.)

Consistent with §1.1307(b)(1), the FCC correctly concludes in its NPRM that "because [categorically excluded facilities] are extremely unlikely to cause routine exposure that exceeds the guidelines, applicants for such facilities are not required to perform any emissions evaluation as a condition of license, unless specifically ordered to do so by the Commission." NPRM, Paragraph 9. OET Bulletin 65, Edition 97-01, also states: "For transmitting facilities, operations and devices not specifically identified, the Commission has determined, based on calculations, measurement data and other information, that such RF sources offer little potential for causing exposures in excess of the guidelines. Therefore, the Commission 'categorically excluded' applicants and licensees from the requirement to perform routine, initial environmental evaluations of such sources to demonstrate compliance with our guidelines." OET Bulletin 65, p 13. Along this line, the FCC states in Paragraph 18 of the NPRM that "Generally, we presume that licensees are in compliance with our rules unless presented with evidence to the contrary." In addition, FCC regulations provide that if a facility is categorically exempt, a licensee may proceed with construction and operation of the facility. Section 1.1312(c), for example, provides:

> If a facility covered by paragraph (a) [facilities for which no Commission authorization prior to construction is required by the Commission's rules and regulations] of this section is categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures.

See also, §1.1306(a).[3]

The NPRM's proposed more detailed showing for categorically excluded facilities, on the other hand, allows "state or local authorities . . . to request that the personal wireless service provider submit a demonstration of compliance [with the FCC RF exposure limits]." That more detailed showing effectively requires personal wireless service providers to conduct routine evaluations for categorically excluded facilities at the request of state and local authorities, if a provider is required to make a demonstration like that outlined in Paragraph 13 of the NPRM, even though §1.1307(b)(1) expressly states that routine evaluations are not required for categorically excluded facilities and even though, as the FCC has determined, based on calculations, measurement data and other information, that "[categorically excluded facilities] are extremely unlikely to cause routine exposure that exceeds the guidelines."

Requiring what is effectively at least a routine evaluation of categorically excluded facilities at the request of state and local authorities imposes significant costs, administrative burdens, and costly delays that are disproportionate to the "little potential for causing exposures in excess of the guidelines." The FCC, at most, should only permit

---

[3] Section 1.1306(a) provides: "Except as provided in §1.1307(c) and (d), Commission actions not covered by §1.1307(a) and (b) are deemed individually and cumulatively to have no significant effect on the quality

state and local governments to require a certification or other simple showing that the facility is categorically exempt, because it does not exceed the power levels identified in §1.1307, Table 1. State and local governments can have no significant legitimate interest in any greater showing, given that the FCC has already found that the categorically excluded facilities are extremely unlikely to cause routine exposure that exceeds guidelines.

In addition, state and local environmental interests that are legitimate are fully protected by current FCC regulations and procedures, as discussed more fully in Part IV of these Comments, below. Under §1.1307(c), for example, covering categorically excluded facilities, an interested person may submit a petition to the FCC setting forth in detail the reasons for justifying or circumstances necessitating environmental consideration by the FCC. And, under §1.1308(b), when an Environmental Assessment is filed, the FCC (or Bureau) may request further information from interested persons, to assist in making a determination of whether the proposal will have a significant environmental impact. Further, under §1.1313, objections to applications based on environmental considerations may be filed as petitions to deny. In addition, the filing of an Environmental Assessment is published by the FCC in the Federal Register, and interested parties have an opportunity to comment or take other action that may be appropriate.

Sprint PCS recognizes that categorically excluded facilities must comply with the substantive RF exposure guidelines, but Sprint PCS objects to performing routine

---

of the human environment and are categorically excluded from environmental processing." Thus an

evaluations and demonstrating compliance **at the request of state and local authorities**. As just discussed, state and local authorities may submit a written petition to the FCC setting forth in detail the reasons for justifying or circumstances necessitating environmental consideration of a categorically excluded site, and likewise, interested persons may participate in the Environmental Assessment process. The FCC is by far the more appropriate forum to consider RF exposure compliance, especially given the significant problems, disputes, and misunderstandings between personal wireless service providers and state and local authorities on land use and siting issues. CTIA's January 3, 1997 correspondence to Michele Farquhar – which raises the issue of unlawful state and local actions affecting the placement, construction, or modification of personal wireless service facilities based directly and indirectly on RF exposure considerations – touches on just a few kinds of them:

> In recent months, a large number of CTIA's members have expressed concern regarding the issue of State and local government regulations of the services and facilities of wireless telecommunications carriers. The number of parties affected by these regulations, as well as the importance of the issues presented, moves CTIA to request from the Bureau clarification of the law in this area.
>
> Specifically, for illustrative purposes, CTIA herein presents the Bureau with general descriptions of a number of ordinances and disputes made know to CTIA by its members. * * *
>
> The scenarios detailed below represent three of the most frequently disputed issues between wireless carriers and State and local governments: (1) State and local attempts to regulate radio frequency emissions; (2) the imposition of excessive fees and/or the attachment of onerous regulatory

---

Environmental Assessment is not required.

> conditions for antenna siting and the provision of wireless services by State and local governments which operate as barriers to entry for wireless carriers; and, (3) outright moratoria on authorizations for land use and antenna siting of wireless telecommunications facilities.
>
> This [Pacific Northwest] case illustrates that concerns surrounding FCC-authorized RF emissions are the basis, often unexpressed, for State and local discrimination against the construction or modification of wireless telecommunications facilities. * * *
>
> CTIA believes the above-mentioned scenarios, representative of many similar occurrences across the nation, constitute infringements upon Commission authority which threaten the continued development of wireless telecommunications systems. To prevent further disregard for the stated goals of Congress and the Commission in this area, CTIA herein requests clarification of the bounds of State and local authority to regulate the services and facilities of wireless telecommunications carriers.

The Wireless Telecommunications Bureau responded, in part:

> We strongly believe the public interest is served to the extent that wireless telecommunications licensees are able to build out their systems, consistent with Federal law and the recognition of legitimate land use concerns, with a minimum of misunderstanding and delay. January 13, 1997 Correspondence to Thomas E. Wheeler.

Current FCC environmental regulations and procedures already offer a forum to fairly protect all parties' legitimate interests. Those regulations and procedures are the more appropriate way to deal with RF exposure compliance issues.

In the event that the FCC were to permit state and local governments to require routine evaluations of categorically exempt facilities and demonstration of compliance at the request of state and local authorities under the NPRM's proposed more detailed showing – despite the FCC regulations, the FCC's current procedures that protect state

and local interests, and the FCC's factual findings about the limited potential for routine exposure, and despite the disproportionate burden – the FCC should not require a single method for demonstrating compliance with RF exposure guidelines. LSGAC recommends "the Commission adopt a mutually acceptable ***RF testing*** and documentation mechanism that providers and local authorities may use to demonstrate compliance with RF radiation limits," NPRM, Paragraph 9 (emphasis added), and with respect to a more detailed compliance showing, the FCC states "We believe...that this alternative can be workable only if we adopt uniform standards for such a demonstration that would be regarded as sufficient by all state and local governments for demonstrating compliance with the RF guidelines," NPRM, Paragraph 11.

However, it would be unreasonable to impose a single 'uniform standard' for determining compliance that would be used by all state and local governments, given the wide range of complexity involved in determining compliance at various sites. A variety of methods should be available to companies in order to determine compliance, just as the FCC presented various possible methods of determining compliance in OET Bulletin No. 65, which includes different types of calculations and measurement techniques. Moreover, "testing" tends to imply physical measurement, but the FCC's OET Bulletin 65 expressly allows the use of prediction methods to assist in determining compliance – See Section 2 of OET Bulletin 65, "Prediction Methods," which states in the first paragraph: "The material in this section is designed to provide assistance in determining whether a given facility would be in compliance with guidelines for human exposure to RF radiation. The calculation methods discussed below should be helpful in evaluating a particular exposure situation." The Introduction to OET Bulletin 65 further states:

"However, it is not intended to establish mandatory procedures, and other methods and procedures may be acceptable if based on sound engineering practice."

If the FCC insists on a more detailed showing, beyond certifying or demonstrating in a simple manner that facilities are categorically excluded, it is more reasonable to establish uniformity in the **types or categories of information** that could be requested by state and local governments, rather than limit the method of calculation or measurement. This is addressed somewhat in Paragraph 13 of the NPRM relative to the kinds of showing that the FCC would be less likely to preempt in the interim prior to a final ruling. ***Again, it should be made clear that the uniform standard should apply to the type of information presented to demonstrate compliance, not the methodology used to determine the information.***

The cost of a more detailed demonstration actually requiring calculations or measurements to show compliance with RF exposure guidelines, if adopted, should be borne by the state or local government making the demand, because such a detailed demonstration is overly burdensome and disproportionate to the extremely limited potential for causing routine exposures in excess of the guidelines, and given the current FCC procedures in place to protect state and local interests that are legitimate. State and local authorities shouldn't be allowed to make such a demand, but if the FCC permits it, then the state and local authorities should pay the costs. To require personal wireless service providers to bear the costs also would effectively transfer the costs that state and local government would normally have to bear to raise environmental concerns under the FCC's current regulations, and that transfer, logically, could serve as incentive for state and local governments to bring frivolous objections or assert non-legitimate interests,

such as attempting to unreasonably delay or to obstruct the placement, construction, or modification of personal wireless service facilities.

III. Comments on "General Procedures for Reviewing Requests for Relief"

It is more appropriate to deal with RF exposure compliance issues under the current FCC regulations and procedures, than to permit state and local governments to request routine evaluations and compliance demonstrations, as discussed.

A personal wireless service provider has the right to proceed either to federal court or the FCC, if aggrieved by a state or local action, based directly or indirectly on RF considerations, affecting the placement, construction, or modification of personal wireless service facilities. Sprint PCS generally supports a procedure under which parties seeking relief from actions inconsistent with §332(c)(7)(B)(iv) file a request for declaratory ruling, in the event that a provider pursues an FCC remedy, as well as limiting participation in the proceeding to "interested parties," subject to the qualification that the FCC should not permit state and local authorities to use such a proceeding to delay the placement, construction, or modification of personal wireless facilities. In addition, companies who have demonstrated compliance should not be subject to the cost of such challenges nor have their zoning approval unreasonably delayed in order to resolve any such challenge.

IV. Comments on "Rebuttable Presumption of Compliance" and "Operation of Presumption"

Sprint PCS requests that the FCC require state and local governments to prove by competent, substantial, and material evidence that facilities do not comply with FCC exposure guidelines, rather than adopting a rebuttable presumption (a rebuttable

preseumption is not a high enough standard). State and local governments already have a means under the FCC's regulations to fully participate in the FCC environmental review process to protect their interests. But if it is now being proposed that state and local governments be allowed to effectively assume the FCC's compliance function, then state and local governments must be required to prove by substantial, material, and competent evidence that facilities do not comply. If the FCC refuses to adopt that standard in favor of a rebuttable presumption, state and local governments should be required to make a very strong, detailed prima facie case based on measurements or calculations that facilities do not comply with FCC exposure guidelines, in proceedings brought by personal wireless service providers challenging state and local actions taken against the placement, construction, or modification of personal wireless facilities.

Once again, personal wireless service providers may proceed with construction and operation of facilities that are categorically excluded, without environmental processing. Section 1.1306(a) provides that facilities not covered by §1.1307(a) and (b) "are deemed individually and cumulatively to have no significant effect on the quality of the human environment and are categorically excluded from environmental processing." Section 1.1312(c) provides that if a facility, for which no Commission authorization is required, is "categorically excluded from environmental processing, the licensee or applicant may proceed with construction and operation of the facility in accordance with the applicable licensing rules and procedures."

Competent companies can make accurate determinations of whether facilities are categorically excluded, and if a state or local government, or other interested person disagrees, it already has means under the current FCC's regulations to protect its interests

and to ask the FCC to review the categorically excluded facility. Under §1.1307(c), "If an interested person alleges that a particular action, otherwise categorically excluded, will have a significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting for in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (See §1.1313)."

Competent companies can also make accurate determinations of whether an Environmental Assessment is required, and a state and local government, or other interested person, is already permitted under the FCC regulations to participate in environmental processing to protect its interests. For example, §1.1308(b) provides that "To assist in making that determination [of whether the proposal will or will not have a significant environmental effect], the Bureau or the Commission may request further information from the applicant, interested persons, and agencies and authorities which have jurisdiction by law or which have relevant expertise." And, §1.1313 provides that "In the case of an application to which Section 309(b) of the Communications Act applies, objections based on environmental consideration shall be filed as petitions to deny."

This issue of what state and local governments should be required to show to support their actions affecting the placement, construction, or modification of personal wireless service facilities ties back to the discussion about what information state and local governments should be permitted to demand from personal wireless service providers and the current FCC procedures protecting state and local interests. As discussed, state and local interests are protected by the current FCC environmental

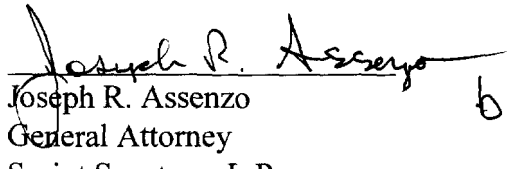
regulations, and the FCC has already determined based on calculations, measurement data and other information that categorically excluded facilities are extremely unlikely to cause routine exposure that exceeds the guidelines. The appropriate way for state and local governments to raise environmental concerns about categorically excluded facilities is to submit a written petition to the FCC (or Bureau) setting forth "in detail the reasons justifying or circumstances necessitating environmental consideration," as provided in sections 1.1307(c) and 1.1313. If a state or local government attempts to determine compliance on its own (as opposed to asking the FCC to conduct the environmental processing), and it takes actions concerning placement, construction, and modification of personal wireless facilities, then the state or local government must do something more than just set forth "in detail the reasons justifying or circumstances necessitating environmental consideration," since that is the minimum it would have had to demonstrate just for the FCC to agree to consider the facilities and make a compliance determination. If state and local governments are going to try to step into the FCC's shoes to try to regulate RF exposure, state and local governments must prove with detailed RF measurements or calculations that the Commission's RF exposure guidelines for controlled or uncontrolled environments is or would be exceeded in the disputed area. An FCC decision, for example, is at least required to be supported by substantial, material, and competent record evidence to be lawful, and so must a compliance decision made by a state or local government.[4]

---

[4] This is also consistent with 47 USC 332(c)(7)(B)(iii), which provides: "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

If the FCC, nevertheless, adopts a rebuttable presumption, state and local governments should still be required to make a very strong, detailed prima facie case based on measurements or calculations that facilities do not comply with FCC exposure guidelines.

Respectfully submitted,



Joseph R. Assenzo
General Attorney
Sprint Spectrum L.P.
d/b/a Sprint PCS
4900 Main St., 12th Floor
Kansas City, MO 64112
(816)559-2514

October 9, 1997